

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6061

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTHONY A. BERSANI,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

)
)
) APPEAL FROM A JUDGMENT AFTER TRIAL
) OF THE NORTHERN DISTRICT OF NEW YORK
)
)

APPEAL BRIEF FOR THE PLAINTIFF

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TABLE OF CONTENTS

	<u>Page</u>
Statement of the Issue Presented.....	1
Statement of the Case.....	2
Argument.....	8
Conclusion.....	10
Footnote.....	11

Citations

Statute involved:

Internal Revenue Code of 1954 (26 U.S.C.)
Sec. 6672

Cases cited:

Campbell vs. Nixon, 207F Supp. 826 (E.D. Mich. 1962).

Thurner vs. United States, 260 F. Supp. 292 (E.D. Wisc, 1966).

United States vs. Hill, 368 F.2d 617 (C.A.5 1966).

White vs. United States, 372 F. 2d 513 (Ct. Cl., 1967).

STATEMENT OF THE ISSUE PRESENTED

During the time the Company was delinquent in making its payments, were the creditors being paid? Similarly, new funds that were deducted from employees' pays being used for other purposes, such as paying other creditors, for the use of Taxpayer?

STATEMENT OF THE CASE

This civil action was brought for a refund of \$212.64 which was paid by Anthony A. Bersani, plaintiff-appellant, as a result of an assessment made against him for the fourth quarter of 1963 and third and fourth quarters of 1964. The defendant had filed a counterclaim for the remaining unpaid balance on this assessment, in the amount of \$19,060.40. After a trial before the Hon. Edmund Port in the United States District Court for the Northern District, judgment was entered dismissing plaintiff's complaint and granting the judgment for the counterclaim.

The subject matter of this suit concerns the failure of Auto Dynamics to pay Federal withholding taxes for various quarters while it was in operation. The quarters involved are the last quarter of 1963 and the third quarter of 1964.

During the periods in suit, Auto Dynamics of Syracuse, Inc. (Company) failed to pay over to the Government withholding taxes for the fourth quarter of 1963, and the third and fourth quarters of 1964. (Record, page 21, Stip. and Order, par. 1.) In an attempt to collect these taxes, the Commissioner of Internal Revenue assessed against the plaintiff, Anthony A. Bersani, on October 8, 1965, the following amounts for the periods indicated (Record, page 21, Stip. and Order, par. 3):

<u>Period</u>	<u>Amount</u>
Fourth quarter, 1963	\$13,082.66
Third quarter, 1964	3,446.40
Fourth quarter, 1964	<u>2,743.98</u>
Total	\$19,273.04

The defendant had subsequently dismissed, with prejudice, the portion of its counterclaim relating to the fourth quarter of 1964, in the amount of the entire assessment attributable to that quarter of \$2,743.98. (Record, page 21, Stip. and Order, par. 4.). Thus, the remaining periods in suit were the fourth quarter of 1963 and the third quarter of 1964.

Through subsequent payments and credits through September 3, 1970, the outstanding amount on the Government's counterclaim was \$15,120.62 plus interest.

The plaintiff timely filed a claim for refund and the instant suit.

The testimony and exhibits in this case should be considered in conjunction with taxpayer's background and ventures during the period in question. Taxpayer formerly was a builder, promoter, financier and real estate developer, first in the Central New York area, and then nationwide, on a relatively large scale.

Taxpayer's undisputed testimony (Record, page 18, transcript Pgs. 9-11), was that at the time of formation of the Company, he was also interested in and developing the Randolph House Motel, Midtown Plaza Office Building, Midtown Car Center, Primex Office Building, Westchester Plaza and other projects. He stated that he had a major financial interest in the following publicly held entities:

- a) Primex Equities Corp.
- b) Primex Realty Associates
- c) Empire State Realty Associates
- d) Westchester Plaza Realty Associates
- f) Midtown Plaza Realty Associates

The entities were either corporations of which Taxpayer was a stockholder, officer and prime mover, or in which he was a general partner of a limited partnership.

Primex Equities Corp. was to develop the old New York Central properties in Syracuse into a major shopping center or a car center. The plan was to have a customer go to a "diagnostic" service center to determine what repairs were needed on his vehicle and then have the customer go to other tenants of the car center to have the work performed.

Ronald Slepín, hereinafter called Slepín, was hired by Mr. Bersani (Record, page 18, Testimony pg. 12), as a leasing agent, to secure tenants for this car center. His salary was to be \$20,000 per year, and a contract was signed.

Taxpayer had Sheldon G. Kall, Attorney, form a corporation known as Auto Dynamics, Inc. to run this "diagnostic" service. Taxpayer had intended to be a 50% partner in the Company, with the other 50% of the stock held by Mr. Low, taxpayer's partner in the real estate development (Record, page 18, testimony pgs. 14 & 75).

Taxpayer further testified (Record, page 18, testimony pg. 19, 22, 23), that at the time of the development of the car center, Primex was also developing a large office building in Syracuse known as Primex Office Building. The same mortgagee for the car center, Sixty Trust Co., was also to be the mortgagee for the office building. If the car center was not successful, taxpayer felt, the mortgage commitment on the office building would be pulled.

Taxpayer stated and affirmed by Kall, that after the initial formation of the Company, it was determined by taxpayer's New York City attorneys that taxpayer and Mr. Low cannot have a financial interest in the Company because of a possible conflict of interest and problems with the SEC. Taxpayer then turned over the Company to Slepín, Petrocci and Aubrey Tambs (hereinafter called Tambs), (Record page 18, testimony pg. 17).

Attorney Guy picked up the Company papers from Kall, (Record page 18, testimony pg. 75). Thereupon Slepian & Tambs were no longer taxpayer's employees, but were in business for themselves.

It cannot be disputed that taxpayer had a vital interest in attempting to have the Company be successful. The Company was the vital part, or the "heart" of the car center. If the Company failed, so did the car center. If the car center failed, so did the Primex Office Building.

Taxpayer admitted that he loaned money to the Company (Record, page 18, testimony pgs. 24 & 45), and would advance monies needed to make payroll, pay portions of the payroll taxes and pay some other creditors, in amounts as needed, and as his ability would allow. Taxpayer also admitted that on one or two occasions, he made sure that the payroll taxes of the Company were paid by other Bersani entities, to Mr. Connors, an IRS agent, (Record, page 18, testimony pg. 29).

Taxpayer could not sign checks for Company, was not a stockholder, officer, director, or person in control, (Record, page 18, testimony, pg. 26). He was, however, a very interested landlord. All the equipment of the Company was owned by Primex, (Record, page 18, testimony, pg. 36). Primex was in the business of collecting rents. Taxpayer suggested that the Company hire John Hildebrandt to assist in the Company's financial problems.

Mr. Anthony Zollo stated that Slepian signed the lease on behalf of the Company to Primex. Slepian was the President and Manager of the car center. The bookkeeping was done by Tambs, who was also an officer. It was Tambs who made out the checks and who paid the bills. Tambs and Hildebrandt ran the financial end of the Company.

Both Mr. Zollo (Record, page 18, testimony pg. 63) and Mr. Hildebrandt (Record page 18, testimony page. 170) testified that taxpayer traveled extensively. Zollo said taxpayer traveled 50% of the time, while Hildebrandt stated that taxpayer would only be at the Company place of business once per week.

Both Slepín and Hildebrandt, witnesses for the government, stated that the Company was having problems with creditors (Record page 18, testimony pgs. 98, 119, 177, 178). Mr. Grossman, attorney for the government, stated that the government must prove that there were other creditors preferred over the government (Record pg. 18, testimony pg. 106).

Numerous documents and exhibits showed that Slepín, Petrocci and Tambs were officers, shareholders and stockholders in the Company, and other ventures related to the Car Center (Record page 18, testimony pg. 111). It is also interesting to note, that Carl Guy, attorney, and a witness for the government, stated that a Mr. Newcomb was to take over the Company from Slepín, Petrocci and Tambs (Record Page 18, testimony pg. 133).

Mr. Hildebrandt further stated that taxpayer gave money to the Company to pay Company payroll and Company suppliers (Record page 18, testimony pg. 170); that the Company's debts were extensive in October, November and December of 1963, and the financial situation of the Company continued to grow worse through May, 1964 (Record page 18, testimony pgs. 177 and 178).

Mr. Connors, Internal Revenue Service and witness for the government, clearly stated the Company situation when he testified that the payroll

tax money paid to Connors came from other Bersani entities and that he (Connors) knew that there were other unpaid creditors (Record page 18, testimony page 184) of the Company.

The evidence clearly indicates that Mr. Bersani lost control of Primex and related entities in the middle of 1964. In the latter part of 1964, and in early 1965, Mr. Bersani, Primex and related entities were declared bankrupt. The Honorable Edmund Port stated that he was familiar with the Bersani bankruptcy matters to some extent. Although the Company continued in business after September 30, 1964, the government conceded that taxpayer was not responsible for Company payroll taxes after that date. (Record page 21, Stipulation and Order).

Two of the government witnesses, Mr. Slepín and Mr. Tambs have been assessed for the payroll taxes owed by the Company. The trial of Mr. Slepín is to await the outcome of the subject trial. It is unknown the status of the Tambs matter.

ARGUMENT

During the time the Company was delinquent in making its payments, were other creditors being paid? Were funds that were deducted from employees' pays being used for other purposes, such as paying other creditors, or for the use of Taxpayer? Were other creditors preferred over the government?

The judgment in this matter must be reversed, since the government failed to meet its burden in proving the above. The government must show that the Company, while being delinquent in making withholding tax payments, had the ability to pay, and also that the Company continued to pay its other creditors (including employees) and that other creditors were preferred over the government. (1).

Nothing can be clearer in the entire testimony, both of plaintiff and defendant's witnesses. The Company had no ability to pay. Few, if any, creditors were being paid. The ability of any of the Company's creditors and employees to be paid were dependent upon Mr. Bersani's desires and ability to continue to advance monies to the Company.

Judge Port in his Memorandum-Decision and Order (Record, page 25, Memorandum-Decision and order- page 3) found there was little or no capital to work from with the money there was coming from Bersani. The government's own witnesses, Slepín, Tambs, Connors and Hildebrandt, supporting this finding, all confirmed that the Company was in financial trouble from the beginning; and that this situation continued to grow worse until the demise of the Company. Payroll, even the net amount, could not be made many times unless Bersani advanced the funds. No rent was paid. Creditors were not paid, but also the withholding was not

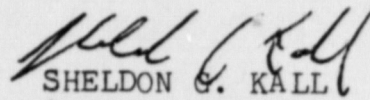
paid, unless Bersani paid them. The funds used by Bersani to pay the Company's bills were not funds of the Company. One can readily ask what was the extent and ability of Taxpayer to continue to advance funds? If Taxpayer advanced net payroll as needed, if Taxpayer advanced money to pay withholding, did these advances obligate Taxpayer to always advance enough money to pay all of the Company's bills, including withholding? I think not.

Taxpayer obviously was aware that Company was not paying its withholding. This is not disputed. But this does not mean Taxpayer willfully refused to pay, or that the Company was able to pay. The truth is, few creditors were being paid and the debts continued to rise. Withholding money was not being used to pay other creditors or used for other purposes. The government's entire case relies on the fact that Auto Dynamics had monies but did not use it to pay the government. At the trial, there was no tie-in as to the source of money. There was no showing of sales, loans, or other contributions. The only evidence introduced at trial on this point was a box of checks and papers (Record, page 18, testimony, pages 103-106). There was no summary or testimony as to these checks and papers, and Judge Port only received them in evidence as a lot of papers with no probative worth (Record, supra). It seems clear that the Judge therefore erred in his ruling, since there was no evidence to support the claim.

CONCLUSION

For these reasons, the judgment must be reversed, the relief requested in the complaint should be granted, and the counterclaim of the defendant should be dismissed with prejudice.

Respectfully submitted,


SHELDON G. KALL
Attorney

FOOTNOTE

(1) Statute involved:

Internal Revenue Code of 1954 (26 U.S.C.)

Sec. 6672 - Failure To Collect And Pay Over Tax,
Or Attempt To Evade Or Defeat Tax.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under Section 6653 for any offense to which this section is applicable.

Cases cited:

Campbell vs. Nixon, 207F Supp. 826 (E.D. Mich. 1962).

Thurner vs. United States, 260 F.Supp. 292 (E.D. Wisc., 1966).

United States vs. Hill, 368 F.2d 617 (C.A. 5, 1966).

White vs. United States, 372 F. 2d 513, (Ct. Cl., 1967).

